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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-707

ARTHUR SANDERS, JR.,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF GEORGIA

PETITION FOR REHEARING

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Petitioner respectfully moves this Court for an Order vacating its denial of the Petition for Writ of Certiorari entered on February 23, 1976, and granting said Petition.

STATEMENT OF THE CASE

The Petitioner herein was charged in the Criminal Court of Fulton County, Georgia with violations of the State obscenity statute, the charges being based upon exhibitions of the motion picture film "Deep Throat" at the Gay Paree Theatre in Atlanta, Georgia. After a jury trial, Petitioner was found guilty and sentenced to a two-year term of imprisonment and to fines in the amount of $2,000.00. The judgment of conviction was affirmed in the Georgia Court of Appeals and in the Georgia Supreme Court in an opinion and judgment for which review was sought in this Court by way of a Petition for Writ of Certiorari. Said Petition for Writ of Certiorari was denied by this Court on February 23, 1976. Mr. Justice Brennan dissented from the denial of the Petition for Writ of Certiorari in an opinion joined by Mr. Justice Stewart and Mr. Justice Marshall.

REASON FOR GRANTING THE PETITION

One of the questions presented in the Petition which was denied by this Court was:

> "Whether the motion picture film 'Deep Throat' can, as a matter of law, be held obscene or whether it constitutes speech protected by the First and Fourth Amendments to the United States Constitution?"

In light of the presentation of said questions in the Petition, the second reason stated for granting the Writ was:

> "The motion picture film 'Deep Throat' upon which petitioner's conviction rests is an artistic work of

> national acclaim which may not, as a matter of applicable constitutional law, be held obscene since it constitutes expression protected under the First and Fourteenth Amendments to the United States Constitution."

The Petition for Writ of Certiorari thus squarely presented for this Court the issue of the legal status of the motion picture film "Deep Throat" as protected or unprotected speech. The Court was called upon to perform its duty of independent Appellate review of the motion picture film in order to determine that question.

Precisely one week after the denial of certiorari in this case, this Court granted a petition for writ of certiorari in a case styled *Marks v. United States,* No. 75-708. Certiorari granted March 1, 1976.

The *Marks* case involves a conviction rendered in the United States District Court for the Eastern District of Kentucky for conspiracy to violate Federal obscenity laws through the interstate transportation of obscene motion picture films. Among the films so transported and alleged to be obscene in *Marks* is "Deep Throat," the film upon which Petitioner's conviction in this case rests.

The United States Court of Appeals for the Sixth Circuit affirmed the District Court convictions in *Marks.* In so affirming, the Court of Appeals rejected, *inter alia,* appellants' argument that the motion picture films there involved were not, as a matter of constitutional law, obscene. Though rejecting the appellants' claim that said films, including the film "Deep Throat," were not obscene, the Court of Appeals

did not itself review the films. This failure to independently review the materials charged as obscene was one of the grounds raised in the Petition for Writ of Certiorari in *Marks*.

As a result of the granting of the Petition in *Marks*, this Court now has before it the question of whether an appellate court must itself view materials charged as obscene in making an independent determination of the issue of obscenity. In making this independent appellate review itself, the Court will be called upon in *Marks* to review the motion picture film "Deep Throat."

The presence of the above issue before this Court for plenary review in *Marks*, clearly constitutes an intervening circumstance of substantial and controlling affect on this case. The Petitioner herein, like the Petitioners in *Marks*, has placed the motion picture film "Deep Throat" before this Court for an independent appellate review of its alleged obscenity. Since the disposition of that issue in *Marks* so substantially affects a proper resolution of the same issue in the instant case, the Court may wish to defer action on this Petition for Rehearing pending a decision in *Marks*.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court grant a rehearing of the Order of Denial, vacate that Order, grant the Petition and review the Judgment and Opinion below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Counsel for Petitioner hereby certify that this Petition for Rehearing is presented in good faith and not for purposes of delay. Said Counsel further certify that said Petition is restricted to the grounds specified in Rule 58(2) of the rules of this Court.

Counsel for Petitioner.